Zali bin Shariff v Timbalan Menteri Dalam Negeri, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–27 OF 2003
HELILIAH J
23 OCTOBER 2003

Administrative Law — Exercise of judicial powers — Detention — Non-compliance of detention order — Order of Minister — Whether made in compliance — Whether defect of form or substance — Dangerous Drugs (Special Preventive Measures) Act 1985, s 6(1) and Federal Constitution arts 149, 151

Preventive Detention — Detention order — Procedural requirement — Order of Minister — Whether made in compliance — Whether omission of certain words in recital rendered entire order defective — Dangerous Drugs (Special Preventive Measures) Act 1985 s 6(1) and Federal Constitution arts 149, 151

The applicant/detainee in this case was being detained pursuant to an order made by the Deputy Minister of Home Affairs under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the 1985 Act'). The counsel for the applicant contended that the deputy minister could not make an order to detain a person under s 6(1) of the 1985 Act merely upon a satisfaction of the fact that the person had involvement with drug trafficking activity. According to the counsel, what the deputy minister must do first before he may exercise his powers was: (i) to satisfy himself that the applicant had connections with drug related activities; and (ii) to satisfy himself further that it was necessary in the interest of public order that such person be detained. It was submitted by the counsel that 'the sting of s 6(1) is not so much in the first but instead the second obligation of the Minister, namely satisfying himself that there is the necessity to detain the detainee having satisfied himself that it is the interest of public order that he be so detained'.

Held, dismissing the application:

(1) Mere surplusage of words or mere omission would not automatically render the order defective. In the instant case, the question was the effect of an alleged omission or the absence of words in the recital part or statement of purpose of the order. The omission to refer to the second part of the s 6(1) of the Act was purely a technical error that did not render the whole order as defective (see paras 35, 49).

(2) The emphasis that was placed on two matters, namely that it was mandatory that the person who was to be detained to be given 'the grounds' and the allegations of fact. Thus, the existence and reality of the validity of the order was preconditioned by the existence of grounds and allegations of facts. The defect if any in the detention order in setting out the objects and purposes of the detention in the alternative was a defect of form only and not of substance and that it did not show that the executive had not adequately applied its need to the desirability of detaining the appellant and therefore did not invalidate the order (see para 39); *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 followed.

(3) Article 151(l)(c) of the Federal Constitution postulates two rights: (a) the detaining authority must as soon as may be communicate to the detainee the grounds on which the order of detainee has been made; and (b) the detaining authority must afford the detainee the earliest opportunity of making a representation against the order. If the precondition for the exercise of the power was not complied with, no amount of additional words added on to the detaining order would render it valid. In communicating the purpose of the detention to the person to be detained, the purpose that was to be formulated by the Act was not to be frustrated by a mere procedural irregularity (see paras 44–45).

[**Bahasa Malaysia summary**

Pemohon/orang ditahan dalam kes ini telah ditahan menurut satu perintah yang dibuat oleh Timbalan Menteri Dalam Negeri di bawah s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta 1985'). Peguam bagi pihak pemohon berhujah bahawa timbalan menteri tidak boleh membuat satu perintah untuk menahan seorang di bawah s 6(1) Akta 1985 hanya dengan berpuas hati atas fakta bahawa seseorang itu terlibat dalam kegiatan pengedaran dadah. Menurut peguam, apa yang timbalan menteri perlu terlebih dahulu lakukan sebelum beliau boleh menggunakan kuasa-kuasanya adalah: (i) untuk berpuas hati bahwa pemohon mempunyai kaitan dengan kegiatan-kegiatan yang melibatkan dadah; dan (ii) untuk berpuas hati selanjutnya bahawa ia adalah perlu demi kepentingan ketenteraman awam bahawa seseorang itu ditahan. Ia dihujahkan oleh peguam bahawa 'the sting of s 6(1) is not so much in the first but instead the second obligation of the Minister, namely satisfying himself that there is the necessity to detain the detainee having satisfied himself that it is the interest of public order that he be so detained'.

Diputuskan, menolak permohonan tersebut:

(1) Hanya perkataan berlebihan atau hanya peninggalan tidak akan secara automatik menjadikan perintah tersebut defektif. Dalma kes semasa, persoalannya adalah akibat sautu peninggalan yang dikatakan atau ketiadaan perkataan-perkataan di bahagian permulaan atau pernyataan tujuan perintah tersebut. Peninggalan untuk merujuk kepada bahagian kedua s 6(1) Akta tersebut adalah semata-mata satu kesilapan teknikal yang tidak mengakibatkan keseluruhan perintah tersebut defektif (lihat perenggan-perenggan 35, 49).

(2) Penekanan yang diletakkan ke atas dua perkara, terutamanya bahawa ia adalah mandatori bahawa seseorang yang akan ditahan hendaklah diberikan 'alasan-alasan' dan pengataan-pengataan fakta. Oleh itu, kewujudan dan kebenaran kesahihan perintah tersebut adalah pra syarat dengan kewujudan alasan-alasan dan pengataan-pengataan fakta. Kecacatan jika ada dalam perintah penahanan yang membutirkan objektif-objektif dan tujuan-tujuan penahanan secara alternatif adalah satu kecacatan dalam bentuk sahaja dan bukan pada amnya dan ia tidak menunjukkan bahawa eksekutif tidak dengan secukupnya

menekankan keperluannya berhasrat untuk menahan perayu dan oleh itu tidak menjadikan perintah tersebut tidak sah (lihat perenggan 39); *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 diikut.

(3) Perkara 151(1)(c) Perlembagaan Persekutuan mempostulatkan dua hak: (a) pihak berkuasa yang menahan perlu secepat mungkin memaklumkan kepada orang yang ditahan alasan-alasan kepada perintah penahanan tersebut dibuat; dan (b) pihak berkuasa yang menahan perlu membenarkan orang yang ditahan peluang terawal untuk membuat satu representasi terhadap perintah tersebut. Jika pra syarat untuk menggunakan kuasa tersebut tidak dipatuhi, tiada tambahan perkataan atas perintah penahanan akan menjadikannya sah. Dalam memaklumkan tujuan penahanan ke atas seseorang yang akan ditahan, tujuan yang dibentuk oleh Akta tidak boleh dikecewakan oleh luar aturan prosedur semata-mata (lihat perenggan-perenggan 44–45).]

Notes

For cases on exercise of judicial powers on detention, 1 see *Mallal's Digest* (4th Ed, 2002 Reissue) paras 125–126.

For cases on procedural requirements of detention orders, 10 see *Mallal's Digest* (4th Ed, 2002 Reissue) para 1363.

Cases referred to

Aminah v Superintendent of Prison, Pengkalan Chepa Kelantan [1968] 1 MLJ 92 (refd)

Attorney General of Hong Kong v Lee Kwong-Kut [1993] AC 951 (refd)

Chong Kim Loy v Timbalan Menteri Dalam Negeri, Malaysia & Anor [1989] 3 MLJ 121 (refd)

Council of Civil Service Union & Ors v Minister for the Civil Service [1965] AC 374 (refd)

East Riding County Council v Perk Estate (Bridlington) Ltd [1957] AC 223 (refd)

Ex parte Johannes Choeldi & Ors [1960] MLJ 184 (refd)

Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 (folld)

Lim Hock Siew & Ors v The Minister of Interior & Defence [1968] 2 MLJ 219 (refd)

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara [2002] 4 MLJ 449 (refd)

Morgan a/l Perumal v K/I Hussein Abdul Majid [1998] 3 MLJ 335 (refd)

Munnich v Godstone RDC [1966] 1 WLR 429 (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd [1979] 1 MLJ 135 (refd)

Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 3 MLJ 28 (refd)

R v Brixton Prison (Governor), ex p Pitt-Rivers [1942] 1 All ER 207 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(2)(c), (3), 5(4), 6(1), 6A(2), 11C(1)

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedures) Rules 1987 rr 2, 3

Defence (General) Regulations 1939 [UK] reg 18B

Federal Constitution arts 5(1), (2), 43(2), 149, 150, 151(1)(a), 160(1)
Internal Security Act 1960 ss 8(1A), 73
Interpretation Acts 1948 and 1967

Gobind Singh Deo (Karpal Singh & Co) for the appellant.
Noor Bahari bin Baharudin (Senior Federal Counsel, Ministry of Internal Affairs) for the respondents.

Heliliah J:

[1] The applicant/detainee in this case is being detained pursuant to an order made by the Deputy Minister of Home Affairs under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the 1985 Act'). The applicant was ordered to be detained at Pusat Pemulihan Akhlak Simpang Renggam.

[2] The applicant's claim that his detention is unlawful is stated in his affidavit in support of the application as founded in para 7(1) of his affidavit which states:

> 7 Saya dengan segala hormatnya menyatakan bahawa penahanan saya sejak mula dan seterusnya adalah tidak sah dan tidak mengikut undang-undang atas sebab-sebab dan alasan yang berikut:
>
> (1) Alasan-alasan penahanan dan dakwaan-dakwaan fakta yang berkenaan dengan perintah saya tidak termasuk dalam lingkungan dan skop seksyen 6(1) Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985; dan

[3] I note also that in para 8 of his affidavit he also states:

> Saya dengan segala hormatnya menyatakan bahawa tahanan saya adalah tidak mengikut langkah-langkah yang teratur dan oleh itu adalah tidak sah dan tidak mengikut undang-undang.

[4] Before proceeding to consider the submission of the learned counsel, I wish to state at the outset the two grounds as stated above would require a reference to art 5(1) and (2) as well as art 151(1)(a) of the Federal Constitution which are as follows:

> 5 (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.
>
> 151 (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

[5] The ambit of the review of the High Court in respect of the exercise of the discretionary power of the Minister under the Act is spelt out in s11C(1) which states:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

[6] Proceedings instituted by way of the writ of habeas corpus is included within the definition of judicial review. My task therefore is to consider whether it could be said in the circumstances there is a non-compliance with any procedural requirement in the Act which governed the act or decision of the Minister which would render the detention in this case unlawful.

[7] Learned counsel for the applicant in advancing his argument has referred to the order made by the Minister dated 10 October 2002. Exhibit ZS-1 referred to in the applicant's affidavit reveals that he did acknowledge receiving documents, the gist of which are as follows:

(a) Satu salinan perintah tahanan di bawah seksyen 6(1) Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985.

(b) Satu salinan penyataan mengenai alasan-alasan yang atasnya Perintah itu dibuat dan pengataan-pengataan fakta yang atasnya Perintah itu diasaskan.

(c) Tiga salinan Borang untuk membolehkan mengemukakan representasi.

[8] This acknowledgement therefore indicates that the order that was served on the applicant includes the alasan-alasan or grounds which in this case states:

> Bahawa *kamu pernah ada* kaitan dengan apa-apa aktiviti yang berhubungan dengan atau yang melibatkan pengedaran dadah merbahaya.

[9] The allegation of facts on which the grounds have been constituted are:

1 Bahawa kamu adalah seorang pengedar dadah jenis heroin yang menjalankan kegiatan pengedaran dadah di Penjara Air Molek, Johore Bahru, Johor sejak bulan Oktober 2000 hingga bulan Januari 2002.

2 Bahawa kamu mengedar dadah jenis heroin dalam bentuk 'barel' dengan harga RM200 hingga RM3,000 satu barel.

3 Bahawa kamu menerima upah untuk menyelindung dadah jenis heroin ke dalam Penjara Air Molek, Johor Bahru, Johor di antara RM500 hingga RM780 bagi setiap 'barel' heroin yang di bawa masuk.

[10] The reason I am first going into such length into the aforesaid matter is that the applicant has stated:

> Alasan-alasan penahanan dan dakwaan-dakwaan fakta yang deskenaan dengan perintah tahanan saya tidak termasuk lingkungan dan skop seksyen 6(1) …

[11] Turning now to the order itself, exh ZS-1 shows the following:

> BAHAWASANYA selepas menimbangkan laporan lengkap penyiasatan dan laporan Pegawai Siasatan yang dikemukakan saya adalah berpuas hati bahawa orang yang nama tersebut di bawah pernah ada atau sedang ada kaitan dengan aktiviti yang berhubungan dengan atau melibatkan pengedaran dadah merbahaya.

[12] The contents of the order forms the thrust of the challenge to the validity of the order. The learned counsel for the applicant contends that the deputy minister cannot make an order to detain a person under s 6(1) of the 1985 Act merely upon a satisfaction of the fact that the person has involvement with drug trafficking activity. According to counsel is that, what the Deputy must do first before he may exercise his powers is to: (1) satisfy himself that the applicant has connections with drug related activity; and (2) to satisfy himself further that it is necessary in the interest of public order that such person be detained. It was submitted by counsel that 'the sting of s 6(1) is not so much in the first but instead the second obligation of the Minister, namely satisfying himself that there is the necessity to detain the detainee having satisfied himself that it is the interest of public order that he be so detained'. The second part of s 6(1) was described by counsel as the live-wire of s 6(1).

[13] Firstly, I wish to state that this line of argument against the impugned order is not without precedents. Counsel for the applicant has referred to the decision in *Lim Hock Siew & Ors v The Minister of Interior & Defence* [1968] 2 MLJ 219 where Wee Chong Jin CJ said (at p 221):

> If authority is needed that a writ of habeas corpus will issue where an order, which is relied upon as justification for the detention of a person, is bad on its face, Ineed only refer to the judgment of Lord Wright in *Greene v Secretary of State for Home Affairs* [1941] 3 All ER 388 at p 403 where he states:
>
> > 'It would be superfluous to point out that the basis of the conclusion here adopted is that the order and statement are good on their face — that is, that they show a competent exercise of a lawful authority. If an order or warrant is bad on its face, it can give no legal justification for imprisonment. Thus, in *Bushell's Case* (1670) Vaugh, 135, a commitment which showed that it was to punish persons for giving a verdict of which the court did not approve, and which was said to be *contra plenam et manifestam evidentiam et contra directionam curiae in material legis,* was held to be bad as showing a cause which was not lawful.'

[14] Having perused *Lim Hock Siew*'s case it is found that in that case there was an order made under s 8(1A) of the Internal Security Act 1960 ('the ISA') which empowered the President in the Republic of Singapore to continue to extend the detention of a person detained under an order of detention after the expiration of the period of detention specified in the original detention order. The question posed Wee Chong Jin CJ was:

> In what manner then must the President make known to a detainee that he, the President is directing that the period of his detention is extended for a further period of time? The learned Judge answered the question as follows: 'In my opinion, either by the President making the direction under one hand or in accordance with the provisions of section 34 of the Interpretation Act 1965'. Section 34 of the Act provides, inter alia, that 'it shall be sufficient' if the exercise of such power by the President be signified under the hand of any Minister or if the Secretary to the Cabinet (underling for emphasis), The order in that case was not even signed by the Minister. Instead it was merely signed by the Permanent Secretary to the Ministry of the Interior and Defence. Wee Chong Jin CJ therefore held the orders ex facie defective.

[15] In the present case, the order though signed by Deputy Minister is permitted by virtue of art 43(2) of the Federal Constitution.

[16] The next question therefore is the alleged omission in the text of the order of the fact that there is no mention or reference that the Minister has satisfied himself that it is necessary in the interest of public order that such person be detained. What is the effect? **A**

[17] Before dealing with this specific question, I wish to mention a passage which seems to be oft cited in recent cases pertaining to an application for the writ of habeas corpus. This is exemplified by the observation of Edgar Joseph Jr J (as he then was) in the case of *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 3 MLJ 28, at p 29 which was: **B**

> There had been a consistent current of judicial opinion in our courts including the latest decisions of the Supreme Court which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so that the provisions of the relevant statute are rigidly and meticulously complied with (see for example *Tan Hoon Seng v Minister of Home Affairs Malaysia & Anor and another appeal* [[1991] 1 MLJ 171, *Rajoo s/o Ramasamy v Inspector-General of Police & Ors* [1990] 1 MLJ 430 and a series of 11 recent appeals heard together, the first being *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297 in all of which the detainee succeeded on procedural grounds. **C** **D**

[18] The above statement more simply stated means that a court does not interfere if the discretion is properly exercised. Raja Azlan Shah FJ in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd* [1979] 1 MLJ 135, at p 148 expressed the idea that 'Every legal power must have legal limits, otherwise there is dictatorship .... In other words, every discretion cannot be free from legal restraint.' **E**

[19] How is it to be ascertained that the order of the Minister made under s 6(1) is in compliance with the Dangerous Drugs (Special Preventive Measures) Act 1985? While this legislation has been enacted pursuant to art 149 of the Federal Constitution, such a law is also subject to the restriction laid down by Parliament in art 151. For the purposes of the present application the provision to be given specific focus is para (a) of cl 1 of that article, The words 'shall as soon as may inform him of the grounds for his detention and, subject to clause (3) the allegations of fact on which the order is based, and shall give him the opportunity of making representation against the order as soon as may be' constitute the fundamentals which are mandatory in nature. Those provisions constitute the yardstick which render it imperative that a law enacted pursuant to arts 149 or 150 shall incorporate those restrictions which represent the safeguard for a person who is to be detained under a law relating to preventive detention. **F** **G**

[20] While there may be three parallel legislation relating to preventive detention it is material that each legislation be closely examined for each legislation contains its own scheme for the implementation of the legislation as there are certain variables for each legislation. This, in my view is amply demonstrated in the case of *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara* [2002] 4 MLJ 449 which in the course of his judgment Steve Shim CJ (Sabah and Sarawak) pointed out: **H**

> Quite clearly, in the case where the Minister in deciding whether or not to issue a detention order under the Dangerous Drugs (Special Procedure Measures) Act, he has to consider the police investigations or reports submitted to him. There is **I**

a mandatory obligation for him to do so. Such express provisions are conspicuously, absent in ss 8 or 73 of the ISA.

[21] Section 6(1) of the Act states that the satisfaction of the Minister is to be predicated upon him considering (a) the complete report of investigation submitted under subsection (3) of s 3 and the report of the inquiry officer submitted under subsection (4) of s 5. Of course the report has to be in relation to a person that has been or is associated with any activity relating to or involving the trafficking in dangerous drugs. In the present proceedings, what is being impugned is the 'Order' of the Minister. RJ Sharpe in his treatise, *The Law of Habeas Corpus* (2nd Ed) at p 323 poses the question, 'By what method and on what grounds can the court go behind the warrant and review that determination. Under modern practice, habeas corpus cases are not usually determined on a formal return but on the affidavits of the applicant and respondent.' Further on, it is stated that:

> Whatever the form, there can be little doubt that habeas corpus is seen by the Judges as a remedy for review. In other words, it is not a form of proceeding which, from time to time incidentally brings into question the validity of a judicial or quasi judicial act: it is one of the accepted remedies regularly used to test the validity of official action in constitutional law … At the same time, it should not be supposed that habeas corpus constitutes a form of appeal with the power to reconsider on the merits.

[22] I turn again to the judgment of Steve Shim CJ (Sabah and Sarawak) in *Mohd Ezam bin Mohd Noor*'s case where approval was still being given to what was stated by Suffian F.C.J. (as he then was) in the case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 which is as follows (at p 478):

> Still later in *Karam Singh*, Suffian FCJ (as he then was) took the opportunity to explain the difference between 'grounds' and 'purposes' with reference to the order of detention issued by the Minister under s.8 of the ISA. This is what he said at p 153:
>
> > 'The order of detention and the grounds when read together means that because the executive thinks (grounds) that the appellant has since 1957 consistently acted in a manner prejudicial to the security of Malaysia, therefore the Yang di-Pertuan Agong is satisfied that it is necessary to detain the detainee with a view to 'purposes' preventing him from doing the things specified in the order.
> >
> > Just as purposes are distinct from grounds of detention, so are grounds of detention distinct from allegations of fact or which the order of detention is based.'

[23] The above approach is being considered in response to Mr Gobind's argument that the Minister has failed to show in the order or in the allegations of fact provided against the detainee that he was indeed satisfied that it was necessary in the interest of public order that the applicant be detained. Since the Federal Court has confirmed the 'subject test' approach in respect of the Ministerial satisfaction under s 8 of the ISA (as opposed to the police powers under s 73 of the same), I therefore revert again to *Karam Singh*'s case in relation to the approach to be taken.

[24] The learned judge Suffian FCJ stated thus:

> The order in the instant case followed the language of s.8 of the Internal Security Act, except for an omission which in my view is immaterial. The document in question is not a conviction nor an indictment nor even a charge. There is nothing

in the Act requiring that the order should be in any particular form and in my judgment the order is not invalid.

[25] It is noted that in *Karam Singh*'s case, Dato' Marshall had argued that s 8 of the ISA allows a person to be detained on four grounds, that the order of detention states three grounds in the alternative, that the grounds supplied to the appellant state only one ground that this shows a casual and cavalier attitude on the part of the authorities as to the necessity of the detention. It was also argued that the order of detention was invalid.

[26] Mr Gobind has submitted that there is indeed authority to say that where a detention order is bad on its face, a court can indeed move to quash the same and order a writ of habeas corpus to issue. In an apparent reference to similar orders which have been made in previous cases under the 1985 Act, Mr Gobind contends that, 'there appears to be significant defect in the standard forms used by the Minister in all cases of this nature'. And he has contended that a defect on the face of the order directing the applicant to be detained involves a 'fundamental principle'.

[27] The statement that 'where a detention order is bad on its face can be quashed' cannot be taken as a bald proposition taken out of the context of the authorities in which it was pronounced. One such case is the decision in *Morgan a/l Perumal v K/I Hussein Abdul Majid* [1998] 3 MLJ 335.

[28] It is relevant however to consider the decision in *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184. This was a case where the Controller of Immigration had issued a detention order after a removal order had been made against persons who were alleged to have overstayed in Malaysia. The detention of the applicant in that case was declared unlawful for the reason that technically the wrong reasons were given in the removal order. The observation of Rigby J then was as follows (at p 186):

> … this is an application for a writ of habeas corpus and the applicant in matters which concern the personal liberty are entitled to avail themselves of any technical defects which may invalidate the order which deprives them of that liberty.

[29] That statement however has to be taken in its context and could be considered under art 5(1) as an unlawful detention as opposed to law made under Part XI where specific safeguards have provided the limitations. The ouster clause in ss 11C(l) of the 1985 Act in any case proscribes the judicial review to instances 'in regard to any question or compliance with any procedural requirement in this Act governing such act or decision'.

[30] The act in question here is the very order made by the Minister under s 6(1) of the Act. The word 'order' is also found in art 151(1)(a) of the Federal Constitution. Article 160(1) of the Federal Constitution, inter alia, provides that 'Law' includes written law. The law now in question is the 1985 Act. No definition is found as to the word 'order' in the Federal Constitution or the 1985 Act. The Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedures) Rules 1987 ('the 1987 Rules') contains, inter alia, the following in r 2:

> 'Detention order' means an order made by the Minister for determining a person under the Act.

[31] The term 'detention order' as it appears in r 3 of the 1987 Rules is in connection with the procedure for making representation which stipulates, inter alia, that the police officer serving the detention order shall at the same time inform the person of his right to make representations against the detention order and also to provide the person served with the detention order with three copies of Form I. It is noted that the format of Form I is specifically prescribed. A notice of hearing of representations is also prescribed. In r 3, it is stated that the police officer serving the detention order on any person 'shall' also provide him with three copies of Form I. This r 3 has been the subject of interpretation in *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*. In that case, the required number of copies of Form T (which according to the Rules are three in number) had not been served by the police officer. The reasons given by Edgar Joseph Jr J (as he then was) in that case are repeated here as it has some bearing on a point to be considered in the present proceedings. It is as follows (at p 31):

> … In my approach to the question whether the requirements of r 3 are mandatory or directory I must ask myself and further question whether the requirements are vital and go to the root of the matter, in which case, they would be mandatory and therefore a breach thereof cannot be condoned for, as HS Ong FJ said in *Re Tan Boon Liat* [1977] 2 MLJ 108 at p 116:
>
> > '… there are mandatory rules, even of procedure, which cannot be passed over lightly as irregularities, because they are incurably illegal as being in contravention of strictly imperative provisions.'
>
> If the requirements of r 3 are not mandatory, they would be directory only and a breach thereof could be condoned provided there is substantial compliance with the requirements read as a whole and provided no prejudice ensues.

[32] Having mentioned the reasons above, the point to be considered in the present proceedings is that no format has been prescribed in the Act for the order to be made by the Minister. It is imperative that the detention order be served on the person to be detained but in the absence of the prescribed format, what in essence then is the 'detention order' stipulated in s 6(1). I find two authorities relevant on the point. In *Chong Kim Loy v Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1989] 3 MLJ 121, the facts of that case show that one of the points raised is identical to the point raised presently i.e. that the order made by the Minister under s 6(1) is bad on its face on the ground that the detention order made no reference to the fact that it is necessary in the interest of public order that such person be detained. What was held, inter alia, by Edgar Joseph Jr J is the following (at p 126):

> The fifth point taken on behalf of the applicant was this: it was submitted that the detention order made by the Minister under s 6(1) against him is bad on its face. In particular, it was argued that under s 6(1) the Minister might make a detention order against any person the subject of the report of an Inquiry Officer under s5(4) provided that he is satisfied as to two matters, namely, (a) that the person concerned has been or is associated with any activity relating to or involving the trafficking in dangerous drugs and (b) that it is necessary in the interest of public order that such person be detained for a period not exceeding two years. But it was said that the detention order made against the applicant made no reference as to (b) and it was accordingly contended that by reason of this omission, the same was bad on the face of it.

Now, nowhere in the Act is there any provision as to the form which the detention order should take. However, it is clear, that a written order properly authenticated by the Minister is essential before any lawful detention can be effected for the Act clearly contemplates the making of a document. It is, however, I think essential that the detention order contain at least so much of the belief of the Minister in regard to a detainee as will inform him, in general terms, of the reasons for his detention so as to enable him to exercise, as soon as reasonably possible, his right to make representation to an advisory board under s 9(1).

In the present case, I consider that the detention order notwithstanding the omission aforesaid complies with these requirements and I therefore fail to see how it could be said that it is thereby invalidated.

[33] The learned judge also applied the reasoning in *R v Brixton Prison (Governor), ex p Pitt-Rivers* [1942] 1 All ER 207 where in a case under reg 18B of the Defence (General) Regulations 1939, a similar point was taken, at p210B:

In my judgment, the absence of the recital does not warrant the inference that the order was made without the Secretary of State having reasonable cause to believe that it was necessary to exercise control over the applicant, whether or not the Secretary of State had such reasonable cause did not, and could not, depend on a recital to that effect. What was vital was that the Secretary of State should have had reasonable cause, and the Court, in opinion, can properly find such cause to exist from the sworn statement of Sir John Anderson, which I have read. It makes no difference that this statement was made more than a year from the date of the order. The important point is the fact stated.'

[34] It is my view that this decision remains consistent with the proposition in *Karam Singh*'s case. Since this part is important, I have no choice but to reproduce it verbatim per Suffian FJ (at p 147):

The order in the instant case followed the language of section 8 of the Internal Security Act, except for an omission which, in my view, is immaterial. The document in question is not a conviction nor an indictment nor even a charge. There is nothing in the Act requiring that the order should be in any particular form and, in my judgment, the order is not invalid.

It seems to me that there has been confusion in this matter by Dato' Marshall's frequent use throughout his arguments of the word 'grounds'. In my judgment, the words 'with a view to preventing that person from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of public order or essential services therein' in section 8(l)(a) of the Internal Security Act do not indicate the grounds for a person's detention; they indicate its purpose or purposes. It is true that the grounds for a person's detention must be given, but grounds are quite distinct from purposes. The Minister has given the grounds for the appellant's for the appellant's detention in exhibit A1. These grounds are quite distinct from the purposes stated in the order of detention, and when the two are read together there is in my opinion no conflict or discrepancy between them. Put in different words, what the grounds supplied and the order of detention say is this' because (grounds) you the appellant have since 1957 consistently acted in a manner prejudicial to the security of Malaysia, the Yang di-Pertuan Agong is satisfied that it is necessary to direct that you be detained with a view to (purposes) preventing you from acting in any manner prejudicial to the security of Malaysia or to the maintenance of public order or to the maintenance of essential services in Malaysia. It is true that the grounds use a phrase which occurs in the order of detention and in section 8 of the Act and Dato' Marshall has fastened on the alleged discrepancy between the language of the grounds and of the order of detention. But in my judgment there is no need for the grounds to be identical with any or all of the purposes of detention. The grounds supplied could be in words totally different from the statement of the purposes of detention.

[35] The above passage show that mere surplusage of words or mere omission would not automatically render the order defective. In the instant case before me, the question is the effect of an alleged omission or the absence of words in the recital part of the order. In my view, however, when one uses the word 'order' in a general sense it may be misleading. The word 'order' has been used to indicate that this is the 'act' done by a Minister and hence a term found in the legislation that is the 1985 Act. But in the context of the preventive legislation, an 'order' in reality comprises three parts and this to my mind is borne in the judgments of Suffian FCJ in *Karam Singh*'s case (at p 153):

> A copy of the order or warrant authorising the appellant's detention has been produced as required by section 368 of the Criminal Procedure Code (Cap G). It is a warrant signed by the respondent Minister directing that the appellant be detained because 'the Yang di-Pertuan Agong is satisfied with respect to [the appellant] that, *with a view to preventing fthe appellant] from acting in anv manner prejudicial to the security of Malavsia/the maintenance of public order therein/the maintenance of essential services therein,* it is necessary to make the order.'
>
> The words underlined are identical with the words in section 8(1) of the Internal Security Act except that (a) the order does not contain, as does section 8, the words 'or any part thereof' immediately after the word 'Malaysia' and (b) the order uses strokes instead of commas. The discrepancies do not affect the validity of the order.
>
> The grounds for the appellant's detention supplied to him only use the words 'You … have since 1957 consistently acted in a manner prejudicial to the security of Malaysia …' The fact that the grounds contain only these words and contain no reference to acting in any manner prejudicial to the maintenance of public order or of essential services in Malaysia or any part thereof, does not make the grounds inconsistent with the order. The words underlined above denote the purposes of detention. Purposes of detention are quite distinct from the grounds of detention. The so-called discrepancy between the order and the grounds does not show that the executive has not adequately applied its mind to the desirability of detaining the appellant and therefore does not invalidate the order. The so-called discrepancy is not a discrepancy at all. The order of detention and the grounds, when read together mean that because the executive thinks (grounds) that the appellant has since 1957 consistently acted in a manner prejudicial to the security of Malaysia, therefore the Yang di-Pertuan Agong is satisfied that it is necessary to detain the detainee with a view to (purposes) preventing him from doing the things specified in the order.
>
> Just as purposes are distinct from grounds of detention, so are grounds of detention distinct from allegations of fact on which the order of detention is based.

[36] The first part of the order is what I would describe as a 'recital' to use the words of Edgar Joseph Jr J. This is really the question before me now that is whether the omission of certain words in the recital would render the entire order defective. It is to be observed also that the recital part could be made comparable to a statement of purpose or object.

[37] I have another reason for reiterating those passages in the *Karam Singh*'s case cited above. The Federal Court in *Mohamad Ezam bin Mohd Noor*'s case also undertook a scrutiny not only of the provisions of the ISA but also to refer to various authorities and writers on the subject of constitutional law which have been adopted in cases. Both the ISA and the 1985 Act to be interpreted in the present proceedings have been enacted under arti 149 of the Federal Constitution and therefore there are very similar if not identical consideration to be given with regard to the question of constitutional restrictions on the question of preventive detention.

[38] The points which I find instructive to be derived from the Federal Court's decision is as follows:

(a) The judgment of Steve Shim CJ (Sabah and Sarawak) in the course of considering what is described by his Lordship as 'the threshold of reviewability or justiciability of the exercise of discretion under s 73 of the ISA, affirmed the "subjective test" to be accorded to the exercise of Ministerial power in the context of the language used', ie 'if the Minister is satisfied'.

(b) The judgment of Abdul Malek Ahmad FCJ gave approbation to the observation of MP Jain in his book *Administrative Law of Malaysia and Singapore* (3rd Ed) where he dealt with the decision in *Re Tan Sri Raja Khalid bin Raja Harun; Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182. The parts which I wish to quote is as follows (at pp 501–502):

> In Malaysia, in *Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 MLJ 468, out of the several facts on which the detention order was based, one fact was entirely wrong and non-existent. The High Court quashed the order and issued habeas corpus saying that the order was made 'without care, caution and a proper sense of responsibility'. However, the Supreme Court, on appeal, reversed the High Court and went to the extent of saying that preventive detention would not be illegal simply because the allegations of fact supplied to the detainee in pursuance of art 151(2)(l)(a) and s 11 of the ISA were 'vague, insufficient or irrelevant'. The court did not consider the full implications of art 151 which confers on the detainee the right of getting 'facts and grounds' from the detaining authority and of making 'representation'. How can he make an effective representation if the facts supplied to him for his detention are 'vague, insufficient or irrelevant'? The Supreme Court drew a distinction between 'facts' and 'grounds'. The court argued that while the grounds of detention were open to challenge on the ground of not being within the scope of the law, allegations of fact upon which subjective satisfaction of the Minister was based were not. But then the question arises: how can the 'grounds' be right if the facts on which they are based are wrong. The point to emphasize is that subjective satisfaction to detain a person has to be based on real facts and not on imaginary facts.

[39] The purpose for which I am citing the above passage is the emphasis that is placed on two matters namely that it is mandatory that the person who is to be detained to be given 'the grounds' and the allegations of fact. Thus, the existence and reality of the validity of the order is preconditioned by the existence of grounds and allegations of facts. In my view, this is also the basis of the finding in *Karam Singh*'s case in that the defect, if any, in the detention order in setting out the objects and purposes of the detention in the alternative was a defect of form only and not of substance and that it did not show that the executive had not adequately applied its need to the desirability of detaining the appellant and therefore did not invalidate the order.

[40] I am of the view that the above finding also relates back to what was referred to earlier in that case, that is the references to *Basu's Commentary* as cited in *Aminah v Superintendent of Prison, Pengkalan Chepa Kelantan* [1968] 1 MLJ 92, the relevant excerpts of which are:

> Where the authority is empowered to make an order upon a subjective condition, ie a particular state of his mind, eg 'on being satisfied' or 'having reasonable grounds for believing' that certain facts exist — once an order asserting that state of mind

and belief has been proved in a valid form, by production of a duly authenticated order, the onus is on the person challenging the bona fides of the order to disprove the existence of that state of mind. The onus is obviously more difficult than that of disproving an objective fact. Mere evidence of the applicant that he does not Know that there are any reasons for the authority's belief, or denial that there are or can be any reasons for it, is not a sufficient discharge of the onus so as to call on the authority to explain and justify the assertion of his order.

[41] Abdul Malek Ahmad FCJ also referred to the decision of Lord Fraser of Tullybelton in the case of *Council of Civil Service Union & Ors v Minister for the Civil Service* [1965] AC 374. In that case Lord Fraser in turn cited the statement of Lord Brightman in the case of *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 where the Lord Brightman said 'Judicial review is concerned, not with the decision but with the decision making process'. Further on, Lord Fraser explained:

> The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security. Authority for both these points is found in *The Zamara* [1916] 2 AC 77. The former point is dealt with in the well known passage from the advice of the Judicial Committee delivered by Lord Parker of Waddington at p 107:
>
> > 'Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.'

[42] Steve Shim's CJ (Sabah and Sarawak) judgment in the *Mohamad Ezam*'s case also indicated that his lordship also accepted the correctness of Lord Fraser's proposition in the *Council of Civil Service Union*'s case as follows:

> 'Those who are responsible for the national security must be the sole judges of what the national security requires. It would be undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.'

[43] His Lordship however went on to state that 'although a court will not question the executive's decision as to what national security requires, the Court will nevertheless examine whether the executive's decision is in fact based on national security considerations.'

[44] In my view, art 151(1)(c) postulates two rights: (a) the detaining authority must as soon as may be communicate to the detainee the grounds on which the order of detainee has been made; and (b) the detaining authority must afford the detainee the earliest opportunity of making a representation against the order. If the precondition for the exercise of the power is not complied with, no amount of additional words added on to the detaining order would render it valid. In this respect, I disagree with learned counsel of the applicant that the second part of s 6(1) should be described the live wire. It would make more sense if the detaining order is communicated to the person in such a way that the purpose is understood as it is more in the form of first notice to the person to be detained. What is noticed however is

that some of the cases where the order of detention (ie not the grounds or facts) have been successfully impugned are in fact due to the addition of unnecessary words or surplusage which revealed a non-application of the mind to the facts of the case. As stated in *Karam Singh*'s case that detaining order is not to be equated to a charge.

[45] Moreover, in communicating the purpose of the detention to the person to be detained, the purpose that is to be formulated by the Act is not to be frustrated by a mere procedural irregularity. There is a need to strike a balance as expressed by Lord Denning MR in *Munnich v Godstone RDC* [1966] 1 WLR 429 where citing the remark by Viscount Simonds in *East Riding County Council v Perk Estate (Bridlington) Ltd* [1957] AC 223 (at p 233) that there must be strict adherence to formalities, Lord Denning went on to state:

> We found that many people were taking an undue advantage of that statement. Formalities were being used to defeat the public good. So we no longer favour them. We now reject technicalities and apply the simple test enunciated by Upjohn LJ in *Miller-Mead v Minister of Housing and Local Government* [1963] 2 QB 196 at p 232:
>
> 'Does the (enforcement notice) tell him fairly what he has done wrong and what he must do to remedy it.'

[46] Within the context of the present Act, it has been said that it has been the practice to craft the order in a language without referring to the second part of s 6(1) bearing in mind that the form of an order has not been prescribed. Therefore the failure not to apply it, even if incorrect, does not invalidate or vitiate the procedure in the sense that since it is only a question of form it could not be said that the order has not been properly served on the detenu. Of more importance are the grounds and allegation of facts upon which the order is based. Those are the requirements which are mandatory.

[47] Lord Woolf in *Attorney General of Hong Kong v Lee Kwong-Kut* [1993] AC 951 (at p 975C–D) observed:

> In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislator's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serous crime. It must be remembered the question of policy remain primarily the responsibility of the legislative.

[48] In connection with this observation, I note the provision of s 17A in Part I of the Interpretation Acts 1948 and 1967:

> 17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[49] I therefore find that the omission to refer to the second part of the s 6(1) which I term as a recital or statement of purpose to be purely a technical error that does not render the whole order as defective. In my view when we speak of an order while the recital does exist separately and distinctly from the part that relates to the ground and allegation of facts, the fundamentals, that is, the grounds and allegation of facts would necessarily have to support the statement of purpose.

[50] I wish to add that under s 11B of the 1985 Act a Minister could always revoke an order and to replace it with a fresh order and subsection (2) of s6A of 1985 Act provides that the fresh order would not be inoperative or invalid by reason that no fresh report under sub-s 3 of s 3 and sub-s 4 of s 5 have been submitted. However, if a fresh order is issued with additional grounds or new grounds it may be questionable whether it is for collateral purposes.

[51] Now with those guiding pronouncements in the cases that I have mentioned above, in examining the circumstances of the present application, I wish to state that I am not inclined to agree to the adjective used by learned counsel for the applicant to apply to the alleged defect in the detention order for in the light of the explanation hitherto the defect is considered to be one of form only. The adjective applied by learned counsel to describe the lack of description of the Ministerial satisfaction in the recital part of the order is that it is a 'fundamental breach'. Such an adjective appears to me to be seemingly perjorative. Apart from the use of the term in a contractual relationship, its use in the present context evades the issue at hand.

[52] The detention order when read with the ground as found in exh ZS-1 of the affidavit in support of the application uses phraseology similar to what is found in s 6(1) of the 1985 Act where the governing words are 'pernah ada atau sedang ada kaitan dengan aktiviti yang berhubungan dengan atau melibatkan dadah berbahaya'. The activities described in the allegation of facts show, in my view, that the person to be detained has been or is associated with activities relating or involving the trafficking of heroin a drug listed in the Dangerous Drugs. The description in the order, the ground as well as the allegation of facts do not therefore suffer from the defect that was referred to in *Mohamad Ezam*'s case where Abdul Malek Ahmad FCJ referred to the decision of the Supreme Court in Bangladesh in the case of *Rahman v Secretary Ministry of Home Affairs (Bangladesh) & Anor* [2000] 2 LRS as follows:

> ... The order under review stated that the government was satisfied that the detention was necessary for maintaining public safety and public order but that was not a ground recognized by the Act for the making of such an order.

[53] In my view, what has been stated in the ground and the allegation of facts would repel against para 7(1) of the affidavit of the applicant. However, what Is even more important is to consider the affidavit in return of the deputy minister in opposing the application. Before I do, however, I wish to address the argument that the deputy minister cannot subsequently by affidavit affirm that he was satisfied that it is necessary in the interest of public order that a person be detained. Facts and evidence in the proceedings for an application for habeas corpus are established by way of affidavit as pointed out by Sharpe. In all such cases cited by the senior federal counsel and the counsel for the respondents, I do not glean otherwise. Therefore, the argument that this would amount to an afterthought or an extraneous material cannot be sustained. As emphatically put by Ong Hock Thye CJ (Malaya) in *Karam Singh*'s case, 'In the final analysis the issue is one of fact'. I would add however the reminder from Mohamed Dzaiddin Chief Justice (as he then was) in *Mohamad Ezam*'s case:

> … on the quality of the respondent's affidavits in reply I would adopt the statement in De Smith at pg. 334, that if a prima facie case of abuse of power by a

public authority has been established, the failure of the authority to adduce any evidence in reply from which it can reasonably be inferred that the avowed purposes had in fact been pursued may lead a Court to the conclusion that they have not been genuinely pursued.

[54] The deputy minister has affirmed that he had on 25 August 2002 received a report on the circumstances of the arrest and detention pursuant to s 3(2)(c) of the 1985 Act. The deputy minister has also affirmed that he has received on 19 September 2002, a complete report of the investigation of the police officer making an investigation into the activity of the applicant pursuant to s 3(3) of the 1985 Act as well as the report of the Inquiry Officer pursuant to s 5(4) of the 1985 Act on 9 October 2002. Section 6(1) of the 1985 Act stipulates the precondition that the Minister is to make his decision after considering:

(i) the complete report of investigation submitted under subsection (3) of section 3; and

(ii) the report of the Inquiry Officer submitted under subsection (4) of section 5.

[55] The order that is being impugned states (the relevant parts):

Bahawasanya selepas menimbangkan laporan lengkap penyiasatan dan laporan Pegawai Siasatan yang dikemukakan saya telah berpuas hati …

[56] Exhibit ZS-1 shows that on 11 October 2002, one Inspector Balan a/l Annamalai served on the applicant:

(a) a copy of the detention order;

(b) a copy of the ground and allegation of facts upon which the detention order has been made;

(c) three copies of Form I pursuant to r 3(1) of the 1987 Rules 1987.

[57] It is noted that apart from a bare assertion that the detention 'adalah tidak mengikut langkah-langkah yang teratur' there is no other evidence of non compliance with the 'fundamental yardstick' spelt out in the 1985 Act which is based on art 151 of the Federal Constitution. Moreover, it is also noted that there is only a bare denial of the allegation.

[58] In the circumstances of the case, I find that the order of detention is valid and the application is dismissed.

Application dismissed.

Reported by Sally Kee Seok Meng